Date: April 13, 1998

Case No: 98-TLC-00008

In the Matter of

Zera Farms
Complainant

U. S. Department of Labor
Employment and Training Administration
Respondent

DECISION AND ORDER

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act 8 U.S.C. §1101(a)(15)(H)(ii)(a), and its implementing regulations found at 20 C.F.R. Part 655.[1] On March 23, 1998 the Employer (Zera Farms) requested a hearing de novo before an administrative law judge. The undersigned administrative law judge received this case file from the Office of the Chief Administrative Law Judge on March 27, 1998. Pursuant to Regulation 655 (b)(ii) a hearing was scheduled for and held in Springfield, Massachusetts on April 3, 1998, where the parties had full opportunity to present evidence[2] and argument. This decision is based upon an analysis of the record, the arguments of the parties, and the applicable law and regulations.

Statement of the Case

The Employer/Complainant, Zera Farms ("Zera") has appealed the determination of the Regional Certifying Office of the U. S. Department of Labor, Employment and Training Administration ("ETA") denying Zera's request for temporary agricultural certification under the Immigration and Nationality Act ("INA").

Zera filed its labor certification application with the ETA Regional Office on January 17, 1998 (RX 1, AF 54-55). The application requested certification of ten tobacco farmworkers and

[1] Unless otherwise noted all regulations cited in this decision are in Title 20.

[2] Throughout this Decision and order "CX" refers to Employer/Complainant Exhibits, "RX" refers to U. S. Department of Labor, Employment and Training Administration/Respondent Exhibits and "AFI-65" to pagination by Respondent in RX 1.

included a one month experience requirement stating that the workers "must have experience in grading and preparing tobacco for shipping." Upon review by the Department of Labor (DOL) staff, a number of deficiencies were noted in Zera's application including the work experience requirement (RX 1, AF53).

During a telephone conversation with Mr. Saul Roman, the ETA staff person handling its application, on March 6, 1998, Zera agreed to remove the work experience requirement and delete the language concerning grading and preparing tobacco for shipping from the application (RX 1, AF 45). Zera's application was approved in that telephone conversation of March 6, 1988, although a letter officially informing the Employer of the acceptance of the application was not sent to Zera until March 11, 1998 (RX 1, AF 45-50). However, subsequent to approval of the application by telephone on March 6, 1998, Zera's job order was processed by ETA through the Employment Service System which yielded information by March 9, 1998, that domestic workers were available in the Commonwealth of Puerto Rico (RX 1, AF 7, 42-44). Based on this information that domestic workers were available, a letter dated March 11, 1998 was sent to Zera denying its application for temporary alien labor certification for ten job opportunities (RX 1, AF 39, 40). Zera interviewed ten potential workers identified by the Commonwealth of Puerto Rico's Labor Department in Puerto Rico on March 13, 1998. Zera found nine of the ten potential workers unqualified due to lack of Connecticut broadleaf tobacco experience and just one of the ten qualified as he had some experience working with Connecticut broadleaf tobacco (RX 1, AF 6, 7). Apparently, none of the ten potential workers interviewed by Zera in Puerto Rice were hired. Zera requested administrative review of the denial of temporary alien agricultural labor certification pursuant to section 655.112(a) and subsequently requested a de novo hearing before an administrative law judge on the issue of the ETA denial of Zera's application for temporary alien labor certification.

Testimony at Hearing

Saul Roman, Regional Agricultural and Logging Certification Specialist for the U. S. Department of Labor's Employment and Training Administration Region I Office, testified that he reviewed and processed Zera's application in this case. Mr. Roman said there were deficiencies in the application including the experience requirement Zera had indicated in Block 14 of the application (RX 1, AF 54). Mr. Roman stated that Zera agreed to deletion of this work experience requirement and to correction of other application deficiencies during his phone conversation with Mr. Frank Zera, Jr. on March 6, 1998. Mr. Roman stated he informed Mr. Frank Zera, Jr., during that phone conversation of the results of a survey of tobacco farmers by the State of Connecticut Department of Labor which indicated there was no experience required of U. S. workers as a condition of hire for tobacco farm work (RX 1, AF 62). Mr. Roman stated that Zera's application for temporary alien labor certification was denied on March 11, 1998, after the Commonwealth of Puerto Rico Department of Labor had identified ten U. S. workers available and qualified to fill the positions opened by Zera's job order. Mr. Roman stated that in 1997 he had reviewed applications from nineteen tobacco farm operators in Region I for Field Crop II Farmworkers and that none of the applicants but Zera had indicated an experience requirement. Mr. Roman said these farm operator applicants were both Connecticut shade grown and broadleaf tobacco growers.

Walter Montes, State Monitor Advocate for the State of Connecticut Department of Labor, testified that he had conducted the survey of Connecticut tobacco growers in 1996 and that the results of the survey indicated there was no experience requirement for the hiring of general tobacco workers. Mr. Montes stated that questionnaires were mailed to seven shade grown tobacco farmers and that five replies were received. Mr. Montes said the survey was conducted per regulations providing for such surveys in the "U. S. Department of Labor Employment and Training Administration H-2A Program Handbook" (RX 2). Mr. Montes stated that only three broadleaf tobacco farmers were known to the Connecticut Department of Labor at the time the 1996 survey was conducted. He said that this number of farm operators did not provide a wide enough range of farmers from which to conduct a valid survey of broadleaf tobacco farm operators specifically.

Raimondo Lopez, Regional Certifying Officer of the U. S. Department of Labor, Employment and Training Administration, Region I, testified that in his opinion the State of Connecticut Department of Labor had complied with guidelines set forth in the ETA "H-2A Program Handbook" (RX 2) in conducting the 1996 survey of tobacco farmers. Mr. Lopez also testified that the "Dictionary of Occupational Titles" section submitted by Zera in support of its contention that some work experience is a legitimate requirement in the hiring of farmworkers (CX 2) is a guide only and not binding on the ETA in its administration of the H-2A Program.

Mr. Frank Zera, Jr., partner with his father in Zera Farms, and Mr. Tom Zera, cousin and knowledgeable in Zera's operations, testified as to the farms' needs as related to the H-2A Program. The Zeras expressed their disagreement with the 1996 survey conducted by Connecticut's Department of Labor as it was done without the input of broadleaf tobacco farmers such as Zera. The Zeras related the difficulties Mr. Frank Zera, Jr. had encountered meeting short notice time limitations imposed by the exigencies of the H-2A Program. Mr. Tom Zera testified as to the losses Zera Farms experienced in 1995 due to lack of experienced tobacco workers able to deal with their expected broadleaf tobacco crop that year. The Zeras described their farm operation as rather far flung with growing sites separated by considerable distances. The Messrs. Zera emphasized the farm operation's need for key workers experienced in broadleaf tobacco agriculture to oversee less experienced workers at their various sites due to the owners inability to be present at so many scattered farm fields much of the time. The Zeras asserted their awareness of available and experienced broadleaf tobacco alien farmworkers.

Findings of Fact and Conclusions of Law

In the preface to the ERA H-2A Program Handbook (RX 2) it is stated:

> "The H-2A program is authorized by the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986 (IRCA). The programs establishes a means for agricultural employers who anticipate a shortage of domestic workers to apply for permission to bring into the United States nonimmigrant aliens to perform agricultural

labor or services of a temporary or seasonal nature under the statute, the Attorney General, through the Immigration and Naturalization Services (INS), has the authority for approving an employer's petition to import foreign workers. Before the INS can approve an employer's petition, however, the law requires the employer to apply to the Department of Labor (DOL) for a certification that -

> There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and . . . the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Under Federal Regulations at 20 C.F.R. part 655, Subpart B, the Department of Labor has established procedures and a systematic process to acquire information sufficient to carry out the requirements of the law. The regulations provide the Department's methodology for the two-fold factual determination on the availability of domestic workers and of any adverse effect which would be occasioned by the use of foreign workers for particular temporary and seasonal agricultural jobs in the United States. The guidelines in the handbook represent the best and contemporaneous Employment and Training Administration interpretation of appropriate statues and regulations."

The preponderance of the evidence of record, including the testimony of Mr. Frank Zera, Jr. and Mr. Tom Zera, indicates Zera, the Employer/Complainant, is seeking to hire experienced tobacco farmworkers pursuant to its application for temporary agricultural certification under the INA. More particularly, Zera seeks to hire workers experienced in working with Connecticut broadleaf tobacco.

Zera contends that denial of its application was incorrect in that it was based on the results of a survey conducted by the Connecticut Department of Labor in 1996 which was faulty because Connecticut broadleaf tobacco growers were not contacted to be included in that survey. Zera disputes the Connecticut Department of Labor's information that only three Connecticut broadleaf tobacco farming operations were known to that Department at the time the 1996 survey was initiated. Zera alleges that if broadleaf tobacco farmers had been included in that survey the results of the survey with respect to the lack of experience required for tobacco farmworkers would have been different. The testimony of both U. S. Department of Labor and Connecticut Department of Labor officials, however, was convincing and consistent with the Regulations at Part 655, Subpart B as to be implemented by the guidelines promulgated in ETA's H-2A Program Handbook (RX 2). The "no experience required" standard established by ETA for the hiring of domestic tobacco farmworkers is consonant with applicable law and regulations. Denial of Zera's application for certification to hire temporary alien workers was proper because of Zera's rejection based on lack of work experience of available, able, qualified and willing U. S. workers.

In testimony at hearing Zera pointed out the economic desirability of its being able to hire experienced alien tobacco farmworkers and the crop loss Zera had experienced in 1995 because

of having had to hire inexperienced U. S. farmworkers that year. The undersigned is in sympathy with the Employer/Complainant's expressions of frustration in this regard. Nevertheless, in the case of *Elton Orchards v. Brennan*, 508 F.2d 493 (1st Cir. 1974) the Court stated: "To recognize a legal right to use alien workers upon a showing of business justification would be to negate the policy which permeates the immigration statutes, that domestic workers rather than aliens be employed whenever possible."

The preponderance of the evidence of record has led the undersigned to conclude and find that the ETA determination denying Zera's application requesting H-2A temporary alien labor certification for ten job opportunities was correct as there were a sufficient number of able, willing and qualified U. S. workers identified as available to fill the jobs for which such certification was requested.

Accordingly, the ETA's denial of temporary alien labor certification must be affirmed.

ORDER

The determination of the Regional Certifying Officer in the above case is hereby affirmed.

LAWRENCE P. DONNELLY
Administrative Law Judge

Dated: April 13, 1998
Camden, New Jersey